

SEP 26 1983

Alexander L. Stevas, Clerk

No. 83-201

In the Supreme Court of the United States

OCTOBER TERM, 1983

MILTON WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by denying petitioner's request that the government produce records supporting the main prosecution witness's testimony that he had worked for various government intelligence agencies in the past.

2. Whether the government knowingly used perjured testimony on any material issue to obtain petitioner's conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

<i>Brady v. Maryland</i> , 373 U.S. 83	7
<i>Giglio v. United States</i> , 405 U.S. 150	5-6
<i>Napue v. Illinois</i> , 360 U.S. 264	6
<i>United States v. Agurs</i> , 427 U.S. 97	7

Statutes and rule:

21 U.S.C. 841(a)(1)	1
21 U.S.C. 846	1
Fed. R. Evid. 609	6

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A9-A10) is reported at 714 F.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983. A petition for rehearing was denied on June 7, 1983 (Pet. App. A11-A12). The petition for a writ of certiorari was filed on August 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of the Virgin Islands, petitioner was convicted on one count of conspiracy to distribute cocaine and one count of distributing cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), respectively. He was sentenced to concurrent

terms of imprisonment for ten years and received a three-year special parole term. The court of appeals affirmed (Pet. App. A9-A10).

1. The government's evidence showed that on May 18, 1981, Lucien Feldon came to St. Thomas in the Virgin Islands, at the request of narcotics agent Wilbur Plase, for the purpose of helping the Islands' Narcotics Strike Force as an undercover agent (Tr. 182-183). Thereafter, he met petitioner's co-defendants, Erica Smith and Stephen Sessa, and made several purchases of cocaine, primarily from Sessa (Tr. 102, 111-121, 130-139). After developing this relationship, Feldon made efforts to learn from Sessa who his source was and asked to meet with the source directly in order to purchase larger quantities of cocaine (Tr. 162-164).

On the afternoon of September 9, 1981, Sessa, who was the manager of a store known as the Fruit Bowl, told Feldon that he expected to meet his drug supplier after work (Tr. 147-148). Sessa disclosed that his source would be coming to St. Thomas by ferry and that they would be meeting somewhere on the east end of the island (Tr. 414-415). Feldon notified law enforcement officers, who then arranged to surveil Sessa. Officer Wilfred Berry saw Sessa leave work at 5:25 p.m., drive to a house on the east end of the island and park his car behind a truck identified as belonging to petitioner. When Berry terminated his surveillance an hour later, the vehicles were still parked. At 9:00 p.m., Sessa invited Feldon to his residence and showed Feldon a small quantity of cocaine. Sessa told him that it had come from the same source as a previous purchase that Feldon had made (Tr. 147, 149, 259-260, 415-416).

On September 14, Feldon telephoned Sessa at the Fruit Bowl and asked whether he could purchase two or three ounces of cocaine. Sessa indicated that he thought so, but that he would have to let him know later (Tr. 150). That evening Sessa notified Feldon that the transaction would

have to be delayed one day. The next morning Feldon telephoned Sessa, who said that he had not yet heard from "his man" (Tr. 154). At 2 p.m., Sessa told Feldon by telephone that his source had just called to say that he was on his way (Tr. 154-155). Between 2 and 3 p.m., petitioner was observed arriving at the Fruit Bowl and departing after a brief stay (Tr. 203). At 3:10 p.m., Feldon entered the Fruit Bowl and purchased cocaine from Sessa (Tr. 155-156).

Eventually Sessa divulged to Feldon that petitioner was Sessa's cocaine source (Tr. 422). In late April 1982, Sessa arranged for Feldon to meet petitioner at Sessa's residence. After they were introduced, Feldon asked, "What do you want to do?" Feldon and petitioner then discussed a possible purchase of cocaine. As it turned out, the sale fell through because petitioner was suspicious of Feldon (Tr. 169-173).

2. At trial, Feldon testified about his background. He stated that he and officer Plase had worked for different agencies in Chile in 1966 and that he also had worked for Plase in Aspen, Colorado (Tr. 103-104). During Feldon's cross-examination, petitioner's counsel asked Feldon about his arrest in 1974 for the sale of cocaine to DEA agent William Simpson (Tr. 352-354).¹ The Assistant United States Attorney objected to petitioner's counsel's inquiry into Feldon's arrest in 1974 as not a proper basis for impeachment and as being collateral to petitioner's defense. The district court acknowledged its collateral nature, but

¹On cross-examination Plase denied that when Feldon had agreed to assist him in Colorado from 1978 to 1980, the latter was cooperating as a result of being arrested in New York in 1974 (Tr. 200-201). Plase stated that after recruiting Feldon, he learned that Feldon had been arrested in New York in 1974, but that all charges had been dropped in 1976 (Tr. 204-210).

agreed to permit the examination in order to allow petitioner to probe Feldon's motivation for testifying in this case.

On re-direct examination Feldon was asked by the Assistant United States Attorney to explain the circumstances surrounding the arrest in 1974. Feldon stated that he had been assisting the Defense Intelligence Agency at the time and that the cocaine transfer was part of his undercover work (Tr. 453-458). Petitioner's counsel summoned agent Simpson, the officer who arrested Feldon in 1974, to testify. Simpson said that he was unaware that Feldon's drug activity in 1974 was related to any undercover intelligence work. According to Simpson, Feldon began cooperating with the DEA after his arrest, and as a result of his "outstanding job" the charges were dismissed (Tr. 850-858). The Assistant United States Attorney asked Simpson whether it was possible that Feldon was acting as an undercover agent when he sold cocaine in 1974 and Simpson admitted that it was possible (Tr. 855).

3. Following petitioner's conviction, he filed a motion for a new trial alleging that the government had knowingly used false testimony and had concealed evidence useful to impeach Feldon. The perjury claim was premised upon purported differences in Feldon's background as testified to by Feldon in petitioner's trial compared with his testimony in other trials. The suppression of evidence contention was founded on the rejection *by the court* of petitioner's counsel's request that the government furnish particulars regarding Feldon's history of service on behalf of various government agencies (Pet. App. A3).

At a hearing on the motion, the Assistant United States Attorney informed the court that he had no knowledge of false testimony given by any government witness and that petitioner's counsel had had access to the entire government

file except for a few unrelated items (H. 31).² The lone witness called by petitioner at the hearing, Officer Plase, testified that he first met Feldon in the mid-1960's at a social function in Chile and that an embassy official who did work for the Central Intelligence Agency had introduced Feldon to Plase. Plase further testified that he employed Feldon in Colorado in 1978 after checking with DEA agents in New York, who praised Feldon's undercover work there and that, although Feldon might have mentioned having worked for other agencies, Plase did not attempt to verify that information. Finally, he said that Feldon never told him that the 1974 arrest was a sham (H. 20-25). After this testimony petitioner renewed his demand for production of all information concerning Feldon's status with any government agency for the past 26 years. The district court denied the motion (H. 49).

The court of appeals affirmed petitioner's conviction by judgment order (Pet. App. A9-A10).

ARGUMENT

Petitioner argues (Pet. 13-19) that the government knowingly permitted Feldon to perjure himself regarding his background as a government agent and his 1974 arrest and that the prosecution was able to conceal the perjury by refusing to disclose all information in the government's files regarding Feldon's activities as an undercover informant or agent for various intelligence agencies. Petitioner's claims are without merit.

Even accepting as true petitioner's assertion that Feldon testified falsely regarding his 1974 arrest, it is plain that petitioner could not possibly have been prejudiced by the alleged discrepancies. Compare *Giglio v. United States*,

²"H." refers to the transcript of the hearing on petitioner's motion for a new trial.

405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959). The sole purpose of the inquiry was to determine whether Feldon had any motive for testifying falsely about the cocaine conspiracy and petitioner's involvement in it; the arrest could not properly be used directly to impeach Feldon. See Fed. R. Evid. 609. Since the narcotics charge was dismissed in 1976, long before Feldon ever went to the Virgin Islands, it is clear that nothing regarding that incident colors Feldon's reasons for testifying in this case. Accordingly, the 1974 arrest was completely irrelevant and petitioner never should have been allowed to inquire into it in the first place. Nevertheless, petitioner was allowed to impeach Feldon by cross-examining him about that incident. Since petitioner was granted a wholly unwarranted basis for impeaching Feldon's testimony, he can hardly complain that he was prejudiced by not being allowed to inquire further into the matter.

Nor is there any basis for petitioner's claim that the prosecutors knowingly elicited perjured testimony. The government agent told the court that he had not inquired into Feldon's 1974 arrest because his only concern was how good Feldon was as an undercover agent. In that regard, Feldon had an undeniably excellent reputation. Since Feldon's activities in the Virgin Islands were clearly part of a formal undercover arrangement with the government and were not undertaken because of any pending charges, the prosecutors in this case had no reason to inquire into an eight-year-old arrest. They simply accepted Feldon's version and cross-examined Simpson in order to determine whether he could unequivocally dispute Feldon's story, which he could not.³ In the context of this clearly collateral

³Petitioner argues (Pet. 13) that the prosecutor misled the jury by stating that Feldon had been involved in police activities and undercover intelligence work for 26 years. But that statement appears to be

matter, there is no reason to impute bad motive to the prosecutor's effort to probe the extent of Simpson's knowledge about Feldon's activities in 1974.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

true. Feldon and Plase both discussed Feldon's undercover work in Chile dating back to the 1960's.

Nor did the government's objection to petitioner's pre-trial demand for all government files relating to Feldon raise any issue under *Brady v. Maryland*, 373 U.S. 83 (1963). Even assuming there was a reasonable likelihood that some relevant information might be contained in these files, the district court could properly refuse to require the government to undertake such a burdensome task on such a minor matter. In any event, it is plain that information regarding precisely how many years Feldon had worked for various agencies, which is the only factual matter petitioner has contested (Pet. 14-15), could not possibly have affected the jury's verdict in this case. See *United States v. Agurs*, 427 U.S. 97, 112-113 (1976).